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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FOUR STAR GENERAL PROPERTIES,  
LLC,

Plaintiff and Appellant,

v.

BLUE WATER SUNSET, LLC, et al.,

Defendants and Respondents.

B235357

(Los Angeles County  
Super. Ct. No. BC 456649)

APPEAL from an order of the Superior Court of Los Angeles County, David L.  
Minning, Judge. Affirmed.

Law Office of Gary Kurtz and Gary Kurtz for Plaintiff and Appellant.

Law Offices of Yana Henriks, Yana Henriks; and Randy H. McMurray for  
Defendants and Respondents.

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Four Star General Properties, LLC (Four Star) appeals from the trial court's order granting the special motion to strike the first amended complaint -- pursuant to Code of Civil Procedure section 425.16,<sup>1</sup> California's anti-SLAPP<sup>2</sup> statute -- of respondents Blue Water Sunset, LLC (Blue Water) and Yana Henriks, who is the manager of Blue Water. We affirm the trial court's order granting Blue Water's and Henriks's anti-SLAPP motion to strike.

## **FACTS AND PROCEDURAL HISTORY**

### ***1. The Underlying Action -- "The Dissolution Action" (Case No. BC316696)***

#### **a. The Complaint and Lis Pendens**

Blue Water filed a complaint against Philip Markowitz and a group of limited liability companies (LLC's) as nominal defendants -- First View, LLC, Rail Prop, LLC (Rail Prop), and Markowitz Investment Group, LLC. The complaint alleged that Blue Water was a 50 percent member of these LLC's and that Markowitz was the other 50 percent member of the LLC's. Markowitz was the sole manager of the LLC's. The complaint further alleged that Markowitz was the sole member and manager of another LLC -- Four Star. Markowitz was alleged to be the alter ego of Four Star.

In the underlying complaint, Blue Water asserted causes of action for, among other things, judicial dissolution of the LLC's, fraud, breach of fiduciary duty and imposition of constructive trust, breach of contract, appointment of a receiver for Rail Prop, accounting, and declaratory relief. The gist of the complaint was that Markowitz had mismanaged the LLC's and had in some cases misappropriated assets from them. As to Rail Prop specifically, the complaint alleged that Markowitz caused certain parcels of real property titled to Rail Prop to be transferred to Four Star, though he inserted handwritten language on the deeds indicating that the transfer affected only the manner in which title was held, that Rail Prop and Four Star were "the same," and that no transfer of

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<sup>1</sup> Further statutory references are to the Code of Civil Procedure unless otherwise stated.

<sup>2</sup> Strategic lawsuit against public participation.

ownership took place. Blue Water sought to impose a constructive trust on these properties titled to Four Star.

The trial court appointed a receiver and issued a receivership order in April 2005, and in October 2005, the court amended that order to include in the receivership estate the parcels of real property that Markowitz had purportedly transferred from Rail Prop to Four Star. The court held that the evidence showed Markowitz was operating the properties as parking lot facilities and was receiving rental income from them that he was failing and refusing to turn over to the receiver. The evidence also showed that Markowitz caused the properties to be conveyed from Rail Prop to Four Star, that he controlled both LLC's, and that the deeds in issue "effect[ed] only the manner in which title [was] held and [did] not transfer any property from the grantor to the grantee." The court ordered the receiver to take possession of and manage the properties and collect income from the properties.

In March 2005, Blue Water filed and recorded a lis pendens stating that its lawsuit against the LLC's alleged a real property claim affecting, among other properties, the parcels in issue that Markowitz had transferred from Rail Prop to Four Star and had been operating as a parking lot.

**b. Causes of Action Against Four Star and Its Demurrer**

In 2007, Blue Water amended its complaint to add Four Star as a defendant, alleging breach of fiduciary duty and fraudulent conveyance claims against it (which were, at that point, the 12th and 13th causes of action). The claims were based on Markowitz's transfer of title from Rail Prop to Four Star. The trial court sustained the demurrer of Four Star to the 12th and 13th causes of action without leave to amend, on the ground that they were derivative claims, and Blue Water had not satisfied the pleading requirements of Corporations Code section 800 for asserting derivative claims. Moreover, the court held the causes of action were time-barred, and the pleading failed to comply with the requirements of the Uniform Fraudulent Transfer Act (Civ. Code, § 3439 et seq.). Because the 12th and 13th causes of action were the only ones alleged against Four Star, the court ordered judgment for Four Star.

Four Star submitted a proposed order sustaining the demurrer and a judgment, and the trial court signed and filed that document on October 15, 2007. The order stated that all claims regarding Four Star's property "as set forth in the attached deeds of properties owned by Four Star" were terminated. The attached deeds were those in which Markowitz had transferred title for the parking lot property from Rail Prop to Four Star. Blue Water appealed the judgment in favor of Four Star, and Division Two of this court affirmed the judgment in a nonpublished opinion on the ground that the causes of action against Four Star were improperly pled derivative claims. (*Blue Water Sunset, LLC v. First View, LLC* (Dec. 9, 2008, B204012).)

**c. Markowitz's and Four Star's Attempts to Remove the Properties from the Receivership Estate**

Markowitz tried multiple times to remove the properties that he had transferred to Four Star from the receivership estate, both before and after the court's ruling sustaining Four Star's demurrer. All were unsuccessful. On December 7, 2006, Four Star and Markowitz moved to terminate the receivership or limit it with respect to the properties. The court denied the motion. They renewed the motion in November 2007, after the court had sustained Four Star's demurrer, and the court denied the renewed motion. They again renewed the motion on August 28, 2008, and again the court denied it. Finally, after this court had affirmed the judgment in favor of Four Star, it again moved to have the properties excluded from the receivership estate. The trial court denied the motion on March 11, 2009.<sup>3</sup> The court's ruling stated:

"The existence or non-existence of a claim by Blue Water against Four Star has nothing to do with the court's inclusion of its property in the Receivership Estate. Indeed, Four Star was not a Defendant when its property was included in the Estate. The court's October 2005 order was

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<sup>3</sup> Neither party includes the briefs or court orders relating to these first three motions in the appellate record. Blue Water and Henriks included the court's March 11, 2009 ruling on the final motion in the record. That ruling provides a procedural background from which we have derived this summary of the other motions.

based on a conclusion that Rail Prop owned the property in question. This conclusion was based in part on evidence that Markowitz operated the existing Receivership property and Four Star's property as a parking lot and was misappropriating Estate income, and in part on the fact that Markowitz avoided paying transfer tax by contending that the deeds from Rail Prop to Four Star did not effect a transfer of ownership. In effect, Markowitz was held to his word and the property was considered by the court as belonging to Rail Prop.

“Whether Blue Water has a viable claim against Four Star for damages based on the deeds as a fiduciary breach and a fraudulent conveyance is a related but not determinative issue. The appellate court held that Blue Water had no such claim based on procedural defects. This ruling has no impact on the court's conclusion that the property belongs to Rail Prop.” (Fn. omitted.)

Similarly, at the hearing on this latest renewed motion, the court stated: “[T]he Court of Appeal's affirmance does not address the issue on which the receivership included this property, and that is because the court sitting next door in 2005 determined that the property that was transferred from Rail Prop to Four Star is, in fact, owned by Rail Prop, and that therefore is properly the subject of the receivership estate. That was the determination in 2005. [¶] That determination is not affected in the slightest by the Court of Appeal's affirmance of judgment in Four Star's favor on the sustaining of the demurrer without leave for failure to properly plead a derivative claim -- there are actually two derivative claims -- based on facts concerning that transfer.”

Blue Water filed its fifth amended complaint on April 14, 2009, in which it alleged a constructive trust over the properties deeded from Rail Prop to Four Star. Four Star was not named as a defendant. Four Star moved to strike all allegations concerning it from the fifth amended complaint on the ground that Blue Water was collaterally stopped from seeking any relief against Four Star and its properties because of the October 2007 judgment in favor of Four Star. The court denied this motion.

## ***2. The Instant Action***

On March 7, 2011, Four Star filed its first amended complaint (FAC) against Blue Water and Henriks in the instant action. The instant action was assigned to a different

judicial officer than the one handling the dissolution action. A notice of related cases was filed and denied.

The FAC alleges causes of action for quiet title/injunctive relief and slander of title. Four Star alleges that it is being unjustly denied possession of its properties, despite prevailing on demurrer and obtaining a judgment in its favor in the underlying dissolution action. Four Star seeks an injunction prohibiting Blue Water and Henriks from “interfering in any manner with Four Star taking possession in the Subject Properties,” “ordering the Receiver for the Subject Properties to take any and all necessary and proper actions to effectuate the injunctive relief ordered,” declaring that “the Subject Properties belong to [Four Star] only free of any liens, interest or rights thereto arising from or relating to” the dissolution action, and declaring that Four Star “is entitled to possession as of December 9, 2009[,] when the judgment against [*sic*] Four Star became final.” The cause of action for slander of title alleges that Blue Water and Henriks refused to remove the lis pendens from the subject properties once judgment in favor of Four Star became final in the dissolution action. Four Star seeks damages for their failure to remove the lis pendens and the creation of a cloud of title.

### ***3. Four Star’s Attempt to “Correct” the Judgment in the Underlying Dissolution Action***

After filing the FAC in the instant action, on March 14, 2011, Four Star filed an ex parte application in the dissolution action for an order nunc pro tunc that would correct a “clerical error” in the judgment. At this point, the dissolution action had been assigned to a new judicial officer.<sup>4</sup> The ex parte application sought to correct the judgment to “make

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<sup>4</sup> Several different judicial officers presided over the proceedings in the dissolution action; some were judges in the writs and receivers department, and some were judges in the court for which the case had been assigned for trial. Judge David Yaffe (in the writs and receivers department) determined that the subject properties should be part of the receivership estate in October 2005. Judge Irving Feffer sustained Four Star’s demurrer and entered judgment for Four Star in October 2007. Judge James Chalfant (in the writs and receivers department) denied Four Star’s last renewed motion to exclude the subject

it conform to the judicial decision actually made.” Four Star argued that there was no lawsuit pending against it regarding the subject properties, nor was any such lawsuit possible given the res judicata effect of the final judgment in the dissolution action, which terminated all claims against Four Star regarding the properties.

Four Star informed the court that, in January 2011, it had applied for a writ of possession with the County Records Center -- Archives Post Judgment Department, based on the judgment. The department denied the application for a writ of possession on the ground that the judgment failed to order that Four Star “take possession of the properties.” Four Star thus requested that the court enter an order nunc pro tunc “to correct the technical omission in the Judgment and add the following words: ‘Possession of the subject properties to Four Star General Properties, LLC is ordered forthwith.’” The newly assigned judicial officer granted the ex parte application and filed the “corrected” order and judgment containing Four Star’s requested language on March 14, 2011.

On April 14, 2011, Blue Water filed a motion to vacate the court’s order granting Four Star’s ex parte application for an order nunc pro tunc. Blue Water argued that Four Star willfully concealed from the court that the subject properties belonged to the receivership estate, and that Four Star had tried and failed several times to have the properties removed from the receivership. The court granted Blue Water’s motion to vacate its previous nunc pro tunc order, thereby invalidating the “corrected” judgment stating Four Star was to take possession of the properties.

Four Star made one more attempt to gain possession of the subject properties by filing a motion for modification of the judgment, or in the alternative, an application for an order directing the clerk to issue a writ of possession. The trial court denied this

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properties from the receivership estate in March 2009. And Judge Rex Heeseman denied Four Star’s motion to strike the allegations against it from the fifth amended complaint in May 2009. By the time Four Star filed the ex parte application, the case had been assigned to Judge Ramona See, who heard and ruled on the application.

motion, stating: “[A]lthough Four Star contends that the requested modification is necessary to effectuate the ‘will of the court,’ the Court’s prior rulings clearly indicate that the subject properties were deliberately included in the receivership estate.”

#### ***4. Blue Water’s and Henriks’s Anti-SLAPP Motion in the Instant Action***

Around the same time that Four Star sought to “correct” the judgment, on April 8, 2011, Blue Water and Henriks filed their anti-SLAPP motion in the instant action. The court granted the anti-SLAPP motion on the ground that Four Star’s claims were based on protected activity -- Blue Water’s and Henriks’s recording of a lis pendens -- and moreover, Four Star failed to demonstrate a reasonable probability of success on the merits. Four Star’s timely appeal from the order granting the anti-SLAPP motion ensued.

#### **STANDARD OF REVIEW**

“Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).) However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.””” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

#### **DISCUSSION**

##### ***The Trial Court Did Not Err in Granting the Anti-SLAPP Motion***

Section 425.16 provides that “[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) Thus, a court’s task in ruling on an anti-SLAPP motion to strike is a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity (“any act of that person in furtherance of the person’s right of petition or free speech under the



United States Constitution or the California Constitution in connection with a public issue”). (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

Second, if the defendant makes such a showing, the court then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*) Here, the trial court did not err because the causes of action against Blue Water arose from protected activity, and Four Star did not show a probability of prevailing on its claims.

**a. The Causes of Action Against Blue Water Arose from Its Protected Activity**

“In the anti-SLAPP context, the critical point is whether *the plaintiff’s cause of action itself was based on an act in furtherance of* the defendant’s right of petition or free speech.’ [T]he ‘anti-SLAPP statute’s definitional focus is not the form of the plaintiff’s cause of action but, rather, the defendant’s *activity* that gives rise to his or her asserted liability -- and whether that activity constitutes protected speech or petitioning.’”

(*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 187.) The principal thrust or gravamen of the plaintiff’s cause of action determines whether the anti-SLAPP statute applies. (*Id.* at p. 188.)

Under the terms of the statute, protected activity includes: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law [and] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . .” (§ 425.16, subd. (e).) “The filing of a notice of lis pendens falls squarely within this definition.” (*Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1050; see also *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1285 [“Capon’s filing of the notice of lis pendens in superior court and the naming of Salma’s lenders as defendants in his lawsuit were writings made in a judicial proceeding. They are squarely covered by section 425.16, subdivision (e)(1).”].)

The quiet title/injunctive relief and slander of title causes of action against Blue Water and Henriks arose from clearly protected activity. The lis pendens gives notice that the dissolution action alleges a real property claim (constructive trust) affecting the

subject properties. The trial court in the dissolution action made the subject properties part of the receivership estate based on the evidence supporting a constructive trust. This happened before Blue Water even added Four Star as a defendant, much less before the trial court dismissed Four Star from the case. The gravamen of Four Star's FAC is that Blue Water and Henriks refused to remove the lis pendens when Four Star obtained a judgment in its favor, and they opposed Four Star's attempts in the trial court to remove the subject properties from the receivership estate. But Blue Water's and Henriks's actions were statements or writings made before a judicial proceeding or made in connection with an issue under consideration by a judicial body. (§ 425.16, subd. (e)(1).) There is no question that their actions constitute protected activity. (*Manhattan Loft, LLC v. Mercury Liquors, Inc.*, *supra*, 173 Cal.App.4th at p. 1050.)

Four Star argues that the filing of the lis pendens was "incidental at best" to this action, and that Blue Water and Henriks are essentially trying to "shrug off" a final judgment in Four Star's favor. We are not persuaded by this argument. Saying that they are trying to "shrug off" the final judgment is just another way of saying that they opposed Four Star's efforts to regain control of the subject properties. Four Star has been denied control of the subject properties because the court in the dissolution action agreed with Blue Water and Henriks that the properties should remain in the receivership, even in light of the dismissal of the causes of action against Four Star. Four Star attempted an end-run around that court's multiple rulings to that effect by filing the instant lawsuit. As we have discussed, Blue Water's opposition to Four Star in the underlying action is protected activity.

**b. Four Star Did Not Show a Probability of Prevailing on the Merits**

Because Four Star's causes of action were subject to the anti-SLAPP statute, the burden shifted to it to show, through competent, admissible evidence, a probability of success on the merits. (*Manhattan Loft, LLC v. Mercury Liquors, Inc.*, *supra*, 173 Cal.App.4th at p. 1050.) "The burden on the plaintiff is similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment." (*Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.) Four Star did not meet its burden.

In the trial court, to show a probability of prevailing on the merits, Four Star relied on the “corrected” order and judgment stating that it was to take possession of the subject properties. The court below did not find the corrected order to be persuasive evidence of a probability of success, noting that Blue Water’s motion to vacate the corrected order was pending. The court in the dissolution action did, of course, vacate that corrected order.

On appeal, Four Star’s sole argument that it demonstrated a probability of success is still the final judgment in its favor. Given that Four Star tried to obtain and was denied a writ of possession for the subject properties based on that same judgment, we are by no means convinced that the judgment demonstrates a probability of success. Again, we refer to the court’s rulings in the dissolution action that, *regardless* of the procedural defects in the claims against Four Star, the subject properties remain part of the receivership estate. Four Star has not proffered any evidence or argument showing that these rulings are wrong and it should therefore prevail on its quiet title claims in this action.

Moreover, Four Star cannot establish at least one essential element of its slander of title claim. Slander of title requires “(1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.” (*Manhattan Loft, LLC v. Mercury Liquors, Inc.*, *supra*, 173 Cal.App.4th at p. 1051.) The lis pendens and any other statements by Blue Water and Henriks in the dissolution action are not “without privilege.” Section 47 of the Civil Code, subdivision (b), provides that a publication made in the course of a judicial proceeding is absolutely privileged. This so-called litigation privilege means that a publication or communication that has some relation to a judicial proceeding cannot be the basis of an action for abuse of process, slander of title, or intentional interference with prospective business advantage. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057; *Woodcourt II Limited v. McDonald Co.* (1981) 119 Cal.App.3d 245, 249-250.) A recorded lis pendens, as long as “it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property,” is such a privileged publication.

(Civ. Code, § 47, subd. (b)(4); *Woodcourt II Limited v. McDonald Co.*, *supra*, at pp. 249-250.) Blue Water's actions, including the filing of the lis pendens identifying the pending dissolution action, were thus privileged publications made in the course of judicial proceedings and could not be the basis for a slander of title action. As a result Four Star could not show a probability of prevailing on the merits.

**DISPOSITION**

The order is affirmed. Respondent to recover costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.